No. 20195

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUFI AND EUGENE C. JONES,

Appellants,

v.

BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION, EDERAL HOME LOAN BANK BOARD, LYTTON FINANCIAL CORPORATION, RT LYTTON, BETH LYTTON, THOMAS W. CLARKE, DR. SAMUEL J. SILLS, GLENN WILSON AND H. P. BRAMAN,

Appellees.

Upon Appeal From the United States District Court for the Southern District of California, Central Division

BRIEF FOR APPELLEE, FEDERAL HOME LOAN BANK BOARD

Richard P. Byrne
4201 Wilshire Boulevard
Los Angeles, California 90005

MacCracken, Collins & Hawes,
Philip R. Collins
1000 Connecticut Avenue, N. W.
Washington, D. C. 20036
Special Counsel for Appellee, Federal Home Loan Bank Board

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STATEMENT CONCERNING JURISDICTION

The jurisdiction of the District Court in the litigation from whence his present attempted appeal is prosecuted, Beverly Hills Federal Savings & Loan Association v. Federal Home Loan Bank Board, et al., Civil Number 62-305-FW, is based upon Section 5(d)(1) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. Section 1464(d)(1) and the Federal Declaratory Judgments Act, 28 U.S.C. Section 2201, 2202, [See Amended and Supplemental Complaint for Declaratory Judgment, Injunction and Other Relief (Tr. I, 36)], as well as Answer, Counterclaim and Cross-Claims filed by Appellee, Federal Home Loan Bank Board and

the respective answers thereto by the respective parties [See Tr. I, 42 Tr. I, 78; Tr. I, 75; Tr. I, 102; Tr. I, 87; Tr. I, 90; Tr. I, 93; Tr. I, 99; Tr. I, 72.][1]

Jurisdiction of this Court of Appeals has attempted to be invoked by Appellants pursuant to 28 U.S.C. Sections 1291 and 1294.[2]

STATEMENT OF THE CASE

On January 26, 1962, the Federal Home Loan Bank Board adopted Board Resolution Number 15,430, pursuant to Section 5(d)(1) o the Home Owners' Loan Act of 1933, as amended. This resolution recited certain improper actions on the part of various enumerated parties including specifically all of the Appellants. In accordance with th statute, the persons upon whom the resolution was served (all appellants were served individually) were given thirty (30) days within whic to correct their violations of law and the regulations of the Federal Home Loan Bank Board (Tr. I, 8).

Within the thirty day period, Beverly Hills Federal Savings & Loa Association (one of the parties served with the aforereferenced resolu tion) filed in the United States District Court for the Southern District of California a Complaint for Declaratory Relief and named as the sol defendant, the Federal Home Loan Bank Board. This Complaint pres-

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[1] Appellants on page 18 of their Brief refer to a Second Amended and Supplemen al Complaint, filed by Appellee, Beverly Hills Federal Savings & Loan Association; this is not part of the record of this appeal and further occurred sub sequent to the action herein sought to be revived and accordingly will not be treated in this brief.

[2] Pursuant to this Court's Order of November 23, 1965, the issue of appellate jurisdiction has been reserved to await a hearing on the merits. Appellee, Federal Home Loan Bank Board specifically adopts and makes a part hereof all reasons advanced previously which demonstrate the lack of appealable in terest of Appellants.

ented the sole issue of the present status, rights and duties of the then directors of the Federal Association and the legality of their election. (Tr. I, 2).

On March 30, 1962, the Federal Home Loan Bank Board adopted Resolution Number 15,703 (Tr. I, 27), which set forth specific charges against each of the Appellants herein, as well as against all other parties previously served with Board Resolution Number 15,430. On April 7, 1962, the defendant, Federal Home Loan Bank Board filed a Motion to Dismiss the Complaint for Declaratory Relief and submitted as a basis therefor, *inter alia*, that the entire controversy had not been presented to the Court since issues presented in Board Resolution Number 15,430 were not presented by such action. On April 23, 1962, United States District Judge Carter denied the motion of the defendant, Federal Home Loan Bank Board to dismiss the complaint and granted the motion of the plaintiff, Federal Association for leave to file an amended and supplemental complaint and for an order adding all interested parties.[3]

The Amended and Supplemental Complaint for Declaratory Judgment, Injunction and Other Relief was filed by the plaintiff, Association on April 23, 1962 (Tr. I, 36). The Association incorporated both Board Resolutions, previously referred to as Exhibits 1 and 2 to their plead-

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[3] The argument made to the Court in regard to indispensable parties in the motion to dismiss the Complaint for Declaratory Relief was of an alternative nature to the argument previously referred to in the above. Specifically, it was argued that since the Board Resolution 15,430 raised the issue of each of the named appellants' right (as well as certain other named persons) to hold office in Beverly Hills Federal as well as their right to serve in a fiduciary capacity in the future, such matters should not be adjudicated without their presence (See paragraph 12(b) of Amended and Supplemental Complaint), Judge Carter specifically rejected this argument. The Appellee Board regrets the necessity to refer to matters outside the record of the appeal. Such references are necessitated by the repeated reference by Appellants to matters outside the record.

ing (See Par. 10, 11 of the Amended Complaint, Tr. I, 39), and specifically incorporated all controversies alleged in such Resolutions to be adjudicated by the court below, (See first prayer for relief, Tr. I, 41). Contrary to the assertion of Appellants in their statement of the case, (top of page 3 and a part of their opening brief), where it is contended tha "no cause of action was stated against these new parties", the Amended and Supplemental Complaint in paragraph 12(b) clearly joins all defendants other than the Federal Home Loan Bank Board to the real and existing controversy set forth in paragraph 11 thereof. Appellants in their Answer to the Amended and Supplemental Complaint prayed that the Court adjudicate and declare their rights, duties, obligations and status as they relate to matters asserted by both plaintiff, Association and defendant, Federal Home Loan Bank Board.

It is to be noted that subsequently no motion was made in accordance with Rule 12(b) of the Federal Rules of Civil Procedure to dismiss for lack of jurisdiction of the person by any party joined and that no such defense was raised in the responsive pleading of any of the parties in accordance with Rule 12(b). Additionally, the Federal Home Loan Bank Board filed individual Cross-Claims against each of the named Appellants herein. Again, the Appellants did not file any 12(b) motions but rather answered individually these Cross-Claims and admitted jurisdiction.

In an endeavor to support their respective positions and to bring the action below to its earliest possible conclusion, the Appellee, Association, the Lytton Appellees and the Appellee Board utilized vigorous discovery. The Appellee, Association caused depositions to be taken of savings and loan executives from San Antonio to San Francisco and from St. Paul to Pittsburgh. Pursuant to exhaustive Interrogatories filed by the Lytton Appellees, the Appellee Board was required to prepare two volumes of Answers containing literally thousands of entries. Additionally, the Appellee Board took the depositions of the Appellee,

Bart Lytton and two of the executives of the Appellee, Lytton Financial Corporation, as well as of the Appellants, Eugene Webb, Jr. and Richards Matthews, Jr. Additionally, the Appellee Board sought and obtained production of documents thru the use of subpoenas *duces tecum*. Throughout these discovery proceedings, there was a marked absence of the Appellants or their counsel from the depositions taken by the Appellee, Association. Counsel for the Appellants, Mr. Pollock, only appeared at the depositions of the Appellee, Bart Lytton and the two executives of the Appellee, Lytton Financial Corporation, which were taken in California, in addition to appearing to represent the two Appellants, who were deposed.

After the litigation was in progress, beginning less than a year after its inception, the Lytton Appellees successively and continually explored ways and means to end the litigation as far as the Appellee, Association and the Appellee Board were concerned. The Appellee Board in connection with any settlement with the Lytton Appellees had one basic notion in mind, as former Chairman McMurray so well explained in his deposition (McMurray Deposition, 41-43, 58-60, 123-177), the first deposition taken by the Appellants in this litigation, which was not taken until March, 1965. Thus, so far as the Lytton Appellees were concerned, the requirement of the Appellee Board from the very beginning or its basic principle, as former Chairman McMurray phrased it, was a complete change in the directors of the Association with the end result of a public interest board of directors being in charge and control of the Appellee, Association, so that it would finally be returned to its proper owners, the members of the Association.

Thus, during the course of the action in Federal Court, never was there any attempt made by the Appellants to settle the litigation from their viewpoint, whether or not they were aware of the Lytton Appellees' repeated offers of settlement.

When the Appellee, Bart Lytton, in December, 1964 suggested a pos-

sible settlement to former Chairman McMurray and agreed that a basic point of any such proposed settlement would be the submission of his resignation and the resignation of all the then present directors of Beverly Hills Federal Savings & Loan Association, the Appellee Board saw that Mr. Lytton and the Lytton defendants were willing to meet the Appellee Board's basic principle as to a settlement with them. Accordingly, acting in the public interest of saving the time and energies, not only of a governmental agency but also of the Federal Association, which would inure to the benefit of the public generally and the members of the Appellee, Association specifically, and after exhaustive negotiations conducted by, and modification as required by, the Appellee Board (McMurray Deposition, 108, 110), the Appellee Board with the Appellee, Association and the Lytton Appellees reached a settlement which was properly approved by District Judge Whelan on January 14, 1965. The Appellants, the Webb defendants below, then moved to set aside the settlemer or in the alternative to require the District Judge to dismiss them.

The Webb defendants contended that they had been "left holding the bag" (Tr. I, 164) because they were not part of the settlement, although from the inception of the litigation they had never indicated any desire or willingness to effectuate a settlement. Counsel for the Lytton defendants at bar in essence defined the phrase "left holding the bag" as the Appellants' counsel's "dismay at being no longer able to count on the other defendants to take depositions throughout the country and otherwise carry the burden of the case for him," which was "doubtless a disappointment" (Tr. IV, 23). Realizing that the dismissal of other Appellees in no way affected the defense of the Appellants of their own unlawful conduct in the sale of Beverly Hills Federal Savings & Loan Association, District Judge Whelan properly refused to grant the relief requested by the Appellants in their motion to dismiss and it is from

his dismissal that Appellants are attempting to prosecute this appeal.

Lastly, the Appellee Board does not wish to burden the Court with natters outside of the record, as raised by the Appellants in their state-nent of the case. However, the Appellee Board desires to call the Court's attention to page 3 of Appellants' Brief where it is asserted hat Eugene Webb, Jr. desiring to relieve himself of his responsibili-ies made arrangements with the Attorney for Lytton to have him be-ome President and General Manager of Beverly Hills Federal Savings & Loan Association.

While true that such arrangements were finally made, it should be aid that Eugene Webb, Jr. in his deposition of October 27 thru Novem-er 6, 1963 testified freely that many contacts, approaches, conversa-ions and negotiations took place over a considerable period of time vith both individuals, such as Richards Matthews, Jr., a co-defendant n this case, and also representatives of several savings and loan hold-ng companies with the objective of selling the Association to their re-pective companies.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court below erred in dismissing the Appellees, vho were defendants and cross-defendants below, Lytton Financial Cor-oration, Beth Lytton, Bart Lytton, Thomas W. Clarke, H. P. Braman nd Glenn Wilson?

2. Whether the Court below erred in not dismissing the Appellants?

3. Whether the Court below erred in granting an Order and Judg-nent of Dismissal to the Lytton Appellees, the Appellee, Association nd the Appellee Board, based upon a Stipulation and Covenant Not to Sue, in which the Appellants were not involved and where such Order nd Judgment preserved the rights of the Appellants?

ARGUMENT

I. SUMMARY OF ARGUMENT

The Court below did not err, as contended by Appellants, in granting an Order and Judgment of Dismissal to the Lytton Appellees, the Appellee, Association and the Appellee Board, based upon a Stipulation and Covenant Not to Sue, in which the Appellants were not involved and where such Order and Judgment preserved the rights of the Appellants.

The controversy below was not bottomed on a theory of a conspiracy between the Appellants and the Lytton Appellees, as can be seen from an examination of the pleadings before this Court. Even assuming for the purposes of argument that this were not the case, there is no inherent bar to dismissing one or more co-conspirators and continuing the action against the remaining defendants. Further, even assuming the existence of the conspiracy charged, it is manifest from the pleadings that each and every Appellant has been charged with individual and specific acts of wrongdoing, for which they are accountable, separate and apart from any theory of conspiracy.

Lastly, there was no impropriety involved in the settlement under review. The record in regard to this settlement is complete and clear. It was a settlement which in fact and law did not alter or affect the rights of the Appellants, but on the contrary was restricted to a settlement between the Lytton Appellees, the Appellee, Association and the Appellee Board, which resulted in the return of the Association to the status of a pure mutual Association under the guardianship of public interest directors and effectively prohibited the Lytton Appellees from participating in the control of the Association for a period of three years.

II. IT WAS NOT IMPROPER FOR THE COURT BELOW TO DISMISS THE LYTTON APPELLEES WITHOUT DISMISSING THE APPELLANTS

A. The Controversy Presented in the Suit at Bar Is Not Bottomed on the Issue of a Conspiracy

An examination of the pleadings before the Court in the action appealed from clearly demonstrates by their very nature and volume that the wrongdoing of the Appellants is not essentially bottomed on any theory of conspiracy between the Appellants and the Lytton Appellees.

Charge I(a) of Federal Home Loan Bank Board Resolution No. 15,703, dated March 30, 1962 (Tr. I, 29) charges violation of their fiduciary duties to the other Members of Beverly Hills Federal Savings & Loan Association by all the Appellants by taking advantage to further their own interests for good and valuable consideration and they failed to disclose the nature of such consideration and to reveal all material and relevant facts to the other members of the Appellee, Association.

Charge II(c) charges that Appellants, Eugene Webb, Jr. and Marguerite R. Webb violated §544.5 of the Regulations of the Federal Home Loan Bank Board and Section 4 of the By-Laws of Beverly Hills Federal Savings & Loan Association when they attempted to conduct a directors' meeting of the Association and to transact business without a quorum being present on or about March 14, 1961 at 1:30 P.M. at Title Insurance and Trust Company.

Charge II(d) charges that Appellants, Rufi and Jones, violated this same section of the Regulations as aforesaid and the same section of the by-laws when they participated in this meeting and transacted most important business, namely, an election to fill vacancies in the Board of Directors without a quorum and knowingly allowed Eugene Webb, Jr. and Marguerite R. Webb, interested directors, to participate in this meeting.

Charge II(e) charges the Appellant, Richards Matthews, Jr., with violating his fiduciary duties of loyalty and good faith to the members when he resigned his directorship as part of an agreement with the othe Appellants to elect and maintain certain persons as officers and directors, as referenced in paragraphs II(c) and (d), *supra*, and allowed this election to take place without a quorum present and "without his taking action consonant with his duties owed to the other members of the Association as a director."

Charge II(f) charges that all the Appellants violated their fiduciary responsibilities of loyalty and good faith to the shareholders by participating in the furtherance and accomplishment of an agreement by certain directors to elect and maintain designated persons in office as officers and directors of the Association, "which was against public policy and accordingly void, and all said participating directors acted with the knowledge of said unlawful agreement."

These Charges, *inter alia*, contrary to the statement made by appellants on page 3 of their opening brief that "no cause of action was stated against these new parties", were incorporated along with the remainder of these Resolutions in the First Amended and Supplemental Complaint of the plaintiff, Beverly Hills Federal Savings & Loan Association (Para. 10 & 11, Tr. I, pp. 38-39). The Webb defendants were by paragraph 12 of this pleading "joined as parties defendant, subject to the authority of the court to treat them as plaintiffs or defendants as may become appropriate in the conduct of this litigation" (Tr. I, p. 40). In the first prayer for relief, the plaintiff, Association (Appellee, Association herein) asks "That the Court adjudicate and declare the rights, obligations and status of plaintiff and of each of the defendants with respect to the controversies hereinabove alleged and order the performance of any and all obligations found to exist on the part of any such parties" (Tr. I, p. 41). Substantially the same relief was prayed for by appellants in their Answer to the First Amended and Supplemental Complaint.

Prior to the Settlement here under attack, other than in the Resolutions above discussed where were the real meats of the charges against the plaintiff, Association, the Webb defendants and the Lytton defendants to be found? The answer to this question is simple and need consume less than a line, — in the Answer, Counterclaim and Cross-Claims of the Federal Home Loan Bank Board.

An examination of this pleading shows the vital and independent role played by the Webbs in this overall transaction. It shows, for example, from a statistical viewpoint that there were two cross-claims levelled at the defendant, Eugene Webb, Jr. and two Cross-Claims levelled against his wife, the Chairman of the Board of the Association, the defendant, Marguerite R. Webb.

In the first Cross-Claim against the Appellee, Eugene Webb, Jr., after setting forth the jurisdictional allegation in the first paragraph thereof, the defendant below and appellee here, the Federal Home Loan Bank Board (hereinafter referred to as Appellee Board) realleged eleven subparagraphs of paragraph eleven of its Answer as paragraphs two through twelve of the Cross-Claim. After the full delineation of the facts involving the unlawful actions of this Appellant, in paragraph thirteen of the Cross-Claim, the Appellee Board alleged that "his unlawful actions" demonstrated "a pattern of lack of responsibility for law and regulation of the Federal Home Loan Bank Board and his duties as a director of a Federal Savings & Loan Association". (Emphasis supplied.) The final paragraph of this Appellee's First Cross-Claim against Appellant, Eugene Webb, Jr., alleges that he "acted with full knowledge of the unlawfulness of the actions charged . . . and acted in extreme disregard of such unlawfulness."

There is further a second Cross-Claim against Eugene Webb, Jr., where with allegations incorporated again from paragraph eleven from the Answer of Appellee Board fourteen paragraphs are required to demonstrate that the wrongful and unlawful sale of proxies and director-

ships of plaintiff, Association was "in willful, deliberate and extreme disregard for and in violation of the fiduciary duties owed by defendant, Eugene Webb, Jr."

Before discussing the Cross-Claims against the other Webb defendants, for example, as we shall set forth herein, *infra*, there are two Cross-Claims levelled against the defendant, Marguerite R. Webb, a comparison is mete between the two Cross-Claims, discussed, *supra*, against Eugene Webb, Jr. and whatever claims were made by Appellee Board against the individual alleged by Appellants to be a "co-conspirator", Appellee, Bart Lytton. Turning, therefore, to the Cross-Claim against "Defendant Bart Lytton", which follows the Cross-Claims against all the Webb defendants, we find that only five paragraphs were required, including the jurisdictional paragraph, with no reference back to paragraph eleven of the Answer of the Appellee Board to allege a demonstration of the "lack of responsibility" on the part of the Appellee, Bart Lytton, "for law and Regulations of the Federal Home Loan Bank Board, and his duties as a director of the Plaintiff, Association."

The reason for this difference in the methodology of these allegations, made by the Appellee Board over two and one-half years prior to the settlement with the Lytton Appellees is that there was no allegation of conspiracy between the Appellants and the Lytton Appellees set forth in its pleading or in its resolutions prior thereto. The language of Appellants' counsel on page ten of the "Opening Brief" to the effect that in its pleading the Appellee Board's "charges actually allege a conspiracy although that term is never used" is proved inaccurate by the very language and format of the Answer, Counterclaim and Cross-Claims of the Appellee Board. The charges in fact never allege a conspiracy but in fact set forth everything that the Appellant, Eugene Webb, Jr., and his fellow Appellants did in order that the Appellants might profit by the Association being purchased by another group. While the lengthy deposition of the Appellant, Eugene Webb, Jr., is not a part of the record before this

Court, in it he has clearly indicated that he discussed with others his proposed "retirement" and accompanying financial arrangements before he began his discussion with the man whom he knew to be, as the language is used in the Appellants' Opening Brief "at the time an attorney for Lytton," Thomas W. Clarke. It is interesting to note that a number of these people, at least one of whom was a representative of a savings and loan holding company, did not take advantage of this opportunity.

In the light of the above, the Appellee Board desires to call the Court's attention to the Appellants' Statement of the Case in their Opening Brief, where on page 3 thereof, the comments made about the Appellant, Eugene Webb, Jr., wanting to retire and arranging his succession assume an entirely different character and are shown to be a distortion of the true facts. This is, of course, aside from the fact that the statements made in that particular paragraph in the Opening Brief of the Appellants form no part of the record of this appeal and have no bearing thereon.

Since Appellants have elected on page 4 of their Opening Brief to include other occurrences relating to the transfer of management of the Association that form no part of the record on this appeal and since they are inaccurately related, Appellee Board has no recourse but to attempt to set the record straight by referring to depositions not included in the record. Appellants contends that it was at Thomas W. Clarke's insistence that Webb agreed to transfer the proxies, whereas it is evident from the Appellee, Bart Lytton's deposition and also from Appellant, Eugene Webb, Jr.'s deposition that it was Mr. Lytton who insisted on such a prerequisite condition before purchasing the Southland Company.

Appellants further state that Mr. Lytton moved in "about a year later", but this is just not in accord with the facts. Appellee, Bart Lytton, was elected Chairman of the Board less than five months after the

initial transfer took place and contrary to the impression that he took over from one H. P. Braman is the fact that Mr. Braman, as President, never was the Chief Executive Officer of the Association, but at all times second in command to the Chairman of the Board.

On page 5 of their Opening Brief, Appellants state that "Bank Board examiners were in nearly constant attendance at Beverly Hills [Federal Savings & Loan Association] up to the date of the Judgment complained of on this appeal." While not pertinent to the appeal and forming again no part of the record, we ask the indulgence of this Court and refer to Appendix E of our brief which consists of a copy of an Affidavit, filed by the Director of the Office of Examinations and Supervision of the Federal Home Loan Bank Board as part of another motion filed in oppositions to Appellants in the District Court in which a similar contention was made. Even a cursory reading of the Affidavit completely refutes their allegation.

The next item Appellee Board must take issue with is the statement, again on page 5 of the Appellants' brief, that this action "dragged along." There was continuing, expensive and exhaustive discovery in this action, although not actively participated in at that time by the Appellants, that required the efforts and time of numerous attorneys and other experts. Interrogatories that the Appellee Board were required to prepare alone required the efforts of over twenty-five (25) Examiner over an extended period of time and cost in excess of $100,000.00. And depositions were taken the length and breadth of this Republic and again it must be stated, and we must beg the Court's indulgence in this since we are only answering matters that Appellants have seen fit to raise, that the Appellants in all of the depositions taken by the Appellee, Association did not take an active part by having representatives present.

While we have answered a number of misleading or inaccurate statements and in the process have burdened this Court with various

references and facts to correct them, we have by no means attempted to challenge directly all such statements in Appellants' Opening Brief. But as a final matter we submit the following inaccuracy: On page 3 of Appellants' Opening Brief, it is contended that Federal Associations were forbidden by their Charters to engage in the activities for which Appellant, Eugene Webb, Jr., had organized the Southland Company. In Appendix C, the Court may examine the Board's ruling as to a Federal Association's prerogative to handle their own escrows and under certain circumstances escrows for others. The Federal Association may also service its own loan and loans sold to others [12 C.F.R. §§ 545.11, 545.15 and 555.4(b)].

In order adequately to set forth similar independent charges against the remaining Webb Appellants, two Cross-Claims totaling twenty-seven paragraphs were required to precisely set forth the charge against Appellant, Marguerite R. Webb, the wife of Appellant, Eugene Webb, Jr., and the Chairman of the Board of Beverly Hills Federal Savings & Loan Association when it was illegally sold. Three additional Cross-Claims were filed against Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones, similarly setting forth individual violations of fifteen to sixteen paragraphs in each Cross-Claim.

All the Appellants in their Answers to the above-described Cross-Claims specifically admitted personal jurisdiction and denied any and all violations charged. This Honorable Court unequivocally upheld the Board's right and power to maintain all of these Cross-Claims under discussion. *Reich et al. v. Webb, et al.*, 336 F.2d 153 (9th Cir. 1964), *cert. den.* 380 U.S. 915 (Oct. Term, 1964).

B. Assuming for Purposes of Argument That a Charge of Conspiracy Between the Appellants and the Lytton Appellees May be Read Into the Pleadings Before the Court Below, the Appellants Can Be Sued Alone as Defendants.

Even if it were assumed for the purposes of argument that a charge of conspiracy is to be read into the controversy under consideration, the Appellants were not required to be dismissed by Judge Whelan merely because of a settlement among the Lytton Appellees, the Appellee, Association and the Appellee Board. Although the entire body of citations of the Appellants is directed to this point, it is submitted that none of these authorities sustains such a conclusion as advanced by Appellants.

The authorities cited by Appellants may be divided into two broad categories. The first are cases which articulate the principle that an allegation of a conspiracy is defective if it merely alleges that a corporation acting through its agents, servants or employees had conspired for the reason that, unless there was an allegation to indicate that the agents of the corporation were acting in other than their normal capacities, the requirement that there must be two or more persons or entities to have a conspiracy is not fulfilled. *Packaged Programs v. Westinghouse Broadcasting Co.*, 156 F. Supp. 76 (D.C. W.D. Pa., 1957); *Johnny Maddox Motor Co. v. Ford Motor Co.*, 202 F. Supp. 103 (D.C. W.D. Tex., 1960); *April v. National Cranberry Association*, 168 F. Supp. 919 (D.C. Mass., 1958) (cases involving allegations of violation of the Sherman Act). *United States v. Carroll*, 144 F. Supp. 939 (D.C., S.D. N.Y, 1956) involved a criminal action for conspiracy to use and acquire gold in violation of the gold laws of the United States. The court dismissed the conspiracy charges for lack of evidence regarding any participants other than one defendant and the corporation he dominated which was used to carry out the alleged wrongdoing.

The second category of cases appear to apply to some degree the same principle as was discussed above to factual situations markedly distinct from the fact pattern before this Court.

Keppleman v. Upston, 84 F. Supp. 478 (D.C., N.D. Calif., S.D., 1949) presented a situation, — to use the District Judge's own words — which was "at once startling, anomalous and unusual." Plaintiff was an Air Force Sergeant who sued certain Air Force Officers and one civilian, whether this civilian was employed by the military or connected with them in any way is not entirely clear. In a four count complaint for damages, the first two counts alleged that the military defendants were instrumental in effecting the false imprisonment of plaintiff upon unfounded charges of embezzelment. Counts three and four alleged that all defendants engaged in a conspiracy against plaintiff whereby they were responsible for a plaintiff's false confinement.

The suit was commenced in a California State Court and transferred to the United States District Court in conformance with federal statutes covering suits brought against military officers in state courts. The court noted that the suit could not have been brought originally in Federal Court and that the plaintiff's cause of action and right to relief are grounded upon state law. A jury was selected and impaneled and counsel for both sides had made their opening arguments when "the United States Attorney presented to this Court a motion to dismiss on behalf of the defendants." This motion presented the initial quèstion of "whether this tribunal has jurisdiction in such a . . . case to grant the relief sought by the plaintiff." It was observed that "[t]he basis for plaintiff's suit is the allegedly false statements made by defendants, which led to his arrest, imprisonment and charge of having embezzled certain army funds." Damages were alleged to flow from the action of making these false statements. The Court determined that in order to entertain the cause and to award plaintiff damages, "it must of necessity examine into the propriety of the Court Martial charges preferred

by defendants, and all the proceedings leading up to the imprisonment of plaintiff, and his eventual release from confinement." (*Ibid.*, at 479.)

Before making any examination of the issue involved the Court referred to the line of demarcation between civil and military authority, stating "indeed, assuming that plaintiff had been convicted by the Military Court, and sought to review the matter before this Court on habeas corpus, our authority would be limited to the isolated issue of jurisdiction on the part of the military tribunal." (*Ibid.*, at 479.)

The Court stated further that the "[p]laintiff had not challenged the jurisdiction of the Army authorities in instituting the proceedings. . . . Were this Court, sitting with a jury, to assume jurisdiction, a chaotic condition would be created, without support either in authority or reason." (Emphasis supplied.) From this the Court reasoned that if the judgment of the Court Martial could not be reviewed, the Court could not inquire into the motives or considerations which entered into the initiation of the charges in the first instance. The Court also additionally proposed an insoluble problem "[h]ow, also, in a civil suit for damages, can the District Court grant relief which must, perforce, be based on the regularity of an Army Court Martial proceeding, the jurisdiction of which had not been challenged?" (*Idem.*)

In citing *Cooper v. O'Connor,* 69 App. D.C. 100, 99 F.2d 135, 138, setting forth the rationale of the policy of law protecting an officer's duties from harassment of civil litigation, the Court remarked: "This language applies with equal force to both civilian and military officers performing their official duties." (*Ibid.*, at 480.)

Additionally, the Court relied on an entirely separate line of non-Federal authorities, which were found to spring from Section 472 of the Military Code of the State of California. This statute provided in essence that no officer ordered by a military court or an officer or person acting under its authority shall be liable, civilly or criminally, for

any such act done in such capacity. Lastly, the Court took judicial notice that the war emergency had not yet been declared at an end. The Court ordered that the complaint be dismissed with prejudice based on the "grounds of lack of jurisdiction and defendants' immunity from liability". (*Idem.*)

It is in this context that a one paragraph reference without authority was made by the Court that the civilian defendant was named only in the third and fourth counts, dealing with the alleged conspiracy. "In the very nature of things, a person cannot conspire with himself. Since the Court is prepared to make its order of dismissal as to the military defendants, it will accordingly make a similar order with respect to the civilian defendant." (*Idem.*)

The case of *Reitmeister v. Reitmeister, et al.*, 162 F.2d 691 (2nd Cir., 1947) was a civil action initiated by virtue of a three count complaint. The first count involved only one defendant, Louis Reitmeister for "intercepting and publishing" two telephone calls. The second count was against Reitmeister and two other defendants charging all three with a conspiracy to "goad" the plaintiff into telephone talks which defendants would thereafter "publish". The third count was directed at all of the defendants for publicly divulging the two telephone conversations in the Surrogate Court for Queens County, New York.

At the conclusion of plaintiff's evidence, the trial judge dismissed the second and third counts but submitted the first count to the jury which in turn brought in a verdict for defendant. In regard to the dismissal of the second count the Circuit Court after a review of plaintiff's evidence upheld the propriety of the trial judge's action and then stated:

> But even assuming that it was an error for the judge to dismiss the second count at the time he did, we should not reverse the judgment in the posture of the case as it now stands . . . from the way that the judge left the case to the jury, they must have found

> that the plaintiff had 'authorized' the 'publishing' complained of, which would be a good estoppel as to Louis [Reitmeister] in a new trial upon the second count. Now it is as much a rule governing a civil action for conspiracy as a criminal prosecution, that there must be two conspirators, so that upon a new trial upon the second count, a dismissal would be inevitable. (At pages 695-696.)

In a review of the third count, it was stated by Circuit Judge L. Hand, who although speaking for the Court was also dissenting in part (Circuit Judges Chase and Clark also writing concurring opinions):

> The third count alleged that all six of the defendants had jointly 'published' the 'intercepted' messages by playing the records in the Surrogate's Court. The plaintiff did not connect either Hopp or Phillips with this 'publishing' and as to them the dismissal was clearly right. Since the judgment upon the first count was in favor of Louis, as in the case of the second count, upon any new trial that judgment will be a good bar or good estoppel, so that as to him also the judgment must now be affirmed. So far, my brother Clark and I are in agreement, but he believes for the reasons stated in his opinion that the dismissal of the third count was also right as to the Lippmans and Nachby. Hence it follows that all three of us agree — although for different reasons — that the judgment should be affirmed on the first and second counts and on the third count as to Louis, Hopp and Phillips; and that two of us — Judge Chase and Judge Clark — think that the judgment on the third count should be affirmed as to the Lippmans and Nachby also, although again for different reasons. I am alone in thinking that the judgment on that count should be reversed as to them and for the following reasons. Although at the close of the plaintiff's case it did not appear how they became acquainted with the 'contents' of the records, it was a fair, I might even say inevitable, inference that they must have become so thru Louis,

> directly or indirectly . . . As I read the statute, anyone who becomes 'acquainted' with the 'contents' of an 'intercepted' message, may not 'publish' it if he knows that it has been 'intercepted' . . . (*Ibid.*, at 696).

Judge Hand went on to state that the records on their face portrayed that the talks had been intercepted and put upon the Lippmans and Nachby the duty of going forward with the proof that the plaintiff as "sender" had consented. Judge Hand also pointed out that these two defendants could not avail themselves of the judgment in Louis Reitmeister 's favor on the first count, although it protected him individually.

> . . . They were by hypothesis joint tort-feasors with him and except in exceptional cases joint tort-feasors are not 'in privity.' Maybe on a trial they could prove that the case at bar was one of the few situations in which the opposite is true, and I would leave that open; but on this record it was otherwise. The fact that as to Louis [Reitmeister], it must be assumed that the plaintiff consented does not mean that he consented as between himself and the Lippmans and Nachby. (Incidentally, the third count is not for a conspiracy and the rule peculiar to that kind of suit does not apply; indeed, it would make no difference anyway, because certainly Pearl Lippman and Nachby were jointly concerned in the 'publication' in the Surrogate's Court.) (*Ibid.*, at 696.)

Judge Hand went on to state in his opinion that the publication in the Surrogate's Court presented an issue upon which the trial judge should have taken a verdict.

Circuit Judge Chase in a concurring opinion held that he would affirm the judgment of the District Court on the ground that there was no interception of the telephone messages in violation of Section 605 of Title 47 of the United States Code and absent such unlawful interception, no issue of disclosure was properly before the Court.

Circuit Judge Clark concurring in the decision stated that in his opinion the authorization as found on the part of the plaintiff for the disclosure involved in the verdict for Louis Reitmeister was a consent that would inure to the benefit of persons such as the defendant who violate no duty to the plaintiff once it has been established that authorization was given to Louis Reitmeister.

> . . . I think the principle is illustrated by Restatement Judgments, 1942, §99, under the caption, 'Where Liability of a Person Is Based Solely upon the Act of Another.' As Comment b states, the rule of the section, that a judgment on the merits in favor of the person committing the tort bars a subsequent action against another responsible for the conduct, does not apply if there is an independent basis of liability against such other person. But this cannot be the case here because, for reasons stated, the acts of the others were not tortious if Louis [Reitmeister] had [plaintiff's] Adolf's consent. (*Ibid.*, at 699.)

The Judge also observed in regard to harmless error as to the direction of the verdict that in his judgment there was no proof of any damages.

In the case of *Elliott v. Paramount Film Distributing Corporation*, 27 F.R.D. 495 (D.C., E.D.,Penna., 1961), plaintiffs filed their complaint against six named defendants, comprising five motion picture distributors and one exhibitor. The complaint charged an illegal conspiracy between the distributors and the one exhibitor, whereby the distributor pursuant to a threatened boycott by the exhibitor conspired to give a ke run and better clearance to the exhibitor's theatres than to plaintiffs' theatre, which the Judge found, although located in Philadelphia, were not in substantial competition. Motions to Dismiss were filed by the individual distributors and prior to disposition of such motions, the distributor defendants granted ". . .'to the plaintiffs the key run the plaintiffs requested and in consideration thereof and as a part of the settle-

ment the plaintiffs agreed to move this Court for an order dismissing this action as to the defendant distributors only.'" (*Ibid.*, at 495). Pursuant to this agreement, upon motion of the plaintiffs, an order was entered, which provided: "'that plaintiffs' claims against Paramount Film Distributing Corporation, . . . [all the other named distributors] are dismissed with prejudice.'" (*Ibid.*, at 495-496). The remaining defendant exhibitor moved to dismiss on a number of grounds, only one of which the Court considered. Specifically, the remaining defendant contended that the complaint should be dismissed upon the ground that the conspiracy charged was alleged to be a continuation and/or outgrowth of a conspiracy, which was adjudicated in *United States v. Paramount Pictures, Inc.* The defendant contended that since he was not a defendant in that litigation, he could not be a party to any conspiracy which was alleged in the complaint.

The Court determined that Goldman was not a defendant and that common sense dictated that as an exhibitor, itself, defendant, Goldman had nothing to distribute but rather depended on distributors for the product. The Judge observed that the distributor defendant is in no position to dictate a distributor defendant's policy on clearances. "The mere fact that in this very case the plaintiffs agreed to dismiss with prejudice against the distributors after the latter had consented to better clearances and clear runs for the [plaintiffs'] Fern Rock Theatre is evidence of this." (*Idem.*)

On page 15 of their brief, Appellants contend that the latter two cases are "on all fours" with our present case. It is submitted that on the contrary the dissimiliarity is marked. In essence, the present case involves a Stipulation for Settlement and a Judgment of Dismissal which by their very terms do not affect, alter or change the rights or obligations of any of the parties remaining in said litigation *inter sese.* (Tr. I, 105-111; 112-113.)

Appellants rather are in the position of remaining defendants as

were the remaining defendants in *Broadway & Ninety-Sixth Street Realt Corporation v. Loew's, Inc.*, 23 F.R.D. 9 (D.C., S.D., N.Y., 1958), in which the District Court concluded that it was quite proper to dismiss part of the defendants in a motion picture anti-trust suit, to which the remaining defendants objected. The Court finding that the remaining defendants had no standing to object, stated that there was "no reason in law or justice why the moving defendants, having bought their peace from plaintiffs, should be required to continue as co-parties [in a litigation] with the objecting defendants and for their sole benefit." (*Ibid.*, at page 11.) See also *Southern Electric Generating Company v. Allen Brad ley Company*, 30 F.R.D. 135 (D.C., S.D., N.Y., 1962), *Cf. Twentieth Cen tury-Fox Film Corporation v. Winchester Drive-In Theatre, Inc.*, ___ F.2d ___ (9th Cir., decided October 22, 1965), in which this Court adopted the rule favored by the *Restatement of Torts*, Section 885(1) to the effect that a release of one tort-feasor releases all others jointly liable unless the release expressly reserves rights against the other.

Lastly, it should be observed that in the normal conspiracy situation, co-conspirators used legal means to accomplish an illegal objective. Of course, the nub of a Sherman Act offense in this regard is the illegality of the objective rather than the character of the means used. As clearly appears from a full reading of the pleading in issue in the present appeal, even assuming the existence of a conspiracy, the Appellants are charged with individual illegal actions for which they are individually responsible.

An appropriate example of the consequences of using illegal means to achieve an unlawful conspiratorial purpose can be seen in the case of *Volasco Products Company v. Lloyd A. Fry Roofing Company*, 308 F.2d 383 (6th Cir., 1962), *cert. den.* 372 U.S. 907. The complaint in that case presented three issues: (1) did the defendant conspire with one or more manufacturers to fix prices in violation of the Anti-Trust Laws; (2) did the defendant alone or in combination with other manufacturers

monopolize or attempt to monopolize by fixing prices on a discriminatory basis; and (3) did the defendant discriminate in prices on a geographic basis, the effect of which discrimination may have been to substantially lessen competition, create a monopoly or to injure, destroy or prevent competition in violation of the Anti-Trust Laws? Thus, the complaint presented issues under Sections 1 and 2 of the Sherman Act and Section 2(a) of the Clayton Act. A general verdict was returned by the jury in favor of the plainitff. In review of this general verdict the Court of Appeals found that the trial judge's instruction to the jury on the law of conspiracy was correct and that the evidence presented was sufficient to take the case to the jury on that issue. However, the Court of Appeals found that the judge's instruction in regard to monopoly was not adequate and further there was no evidence of monopoly in the relevant area by the defendant individually. On a retrial of this case, it appears that the jury brought in a special verdict in which it was found that the defendant had violated Section 2(a) of the Clayton Act by discriminating in prices between the different purchasers. The judgment of the District Court was affirmed in *Volasco Products Company v. Lloyd A. Fry Roofing Company*, 346 F.2d 661 (6th Cir., 1965), *cert. den.*, No. 464, November 8, 1965.

III. THERE WAS NO IMPROPRIETY INVOLVED IN THE SETTLEMENT BETWEEN THE LYTTON APPELLEES, APPELLEE, BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION, AND THE APPELLEE, FEDERAL HOME LOAN BANK BOARD.

In the process of attacking this Settlement, unwarranted and abusive attacks have been made upon the Trial Judge where he is accused of "conduct" not within the spirit of Canon 3 of the Canons of Ethics, as well as similar attacks on all counsel participating in this settlement including by name, Thomas W. Clarke, Esquire and by direct implica-

tion including Rodney K. Potter, Esquire of O'Melveny & Myers, as well as Special Counsel for the Board, the General Counsel of the Board, the then Chairman Joseph P. McMurray, Chairman John E. Horne and Board Member John deLaittre. Perhaps the most direct and appropriate answer to these charges, which were properly rejected by District Judge Francis Whelan as being unfounded, can best be presented by reference to Chairman McMurray's deposition, in which he explained in minute detail the philosophy of this settlement, as well as a repetition of what the record in this case reflects concerning the manner and technique of settlement.

In explaining the philosophy which permeated the settlement among the Lytton Appellees, the Appellee Association and the Appellee Board, former Chairman Joseph P. McMurray, now the President of Queens College in New York City, in his deposition of March 12, 13 and 15, 1965 made it clear that the Appellee, Bart Lytton, had attempted on several occasions prior to December, 1965 to effectuate a settlement with the Federal Home Loan Bank Board, and he recalled particularly that on one occasion the suggestion was made that control of Beverly Hills Federal Savings & Loan Association be transferred to a foundation, which Appellee, Bart Lytton, controlled (McMurray Deposition, pp. 40 ff. He indicated that this proposal was rejected.

Mr. McMurray explained that this was a supervisory problem and the basic principle laid down as a basis for compromise after it had gotten into litigation was that Lytton Appellees would be allowed to receive back their investment plus an allowance for taxes or a situation where they "would get out without a loss but without a profit". (*Ibid.*) He said that the Board "wanted to reverse the transaction which we fel was in violation of the Board's Rules and Regulations and the idea of fiduciary responsibility of the Board of Directors and its officers". (*Idem.*)

When Mr. Deutz attempted to press the witness by inquiring, "Wh

the Board was concerned that Mr. Lytton should get back the full amount that he had expended in this transaction", Mr. McMurray forthrightly replied that "the Board was not concerned that he got back what he expended", — the "truth of the matter" being "that the Board was indifferent to his [Lytton's] financial condition." (McMurray Deposition, pp. 58-60). Then he went on to respond in detail as to what the real philosophy of this settlement was:

> . . . It was a case that took considerable time of the Board, considerable time of many people, and it costs the Board money for legal services, and it would continue to cost the Board money for legal services, and it would continue to cost the association an enormous amount of time and in our judgment an enormous amount of legal fees, and possibly other fees, to what extent public relations expenditures were used in connection or in relation to the case, I don't know. But the Board felt that we wanted to reverse the transaction which we felt was in violation of the Board's rules and regulations, and the idea of fiduciary responsibility of the Association's Board of Directors and its officers. We wanted to reverse this transaction. We would have preferred, and we believed, that if this case had gone to the ultimate decision we had confidence that we would have won. But you are a lawer, . . . with more knowledge of the law and its history than I would have believed that a certain decision would eventuate which didn't eventuate.
>
> So, while we did have confidence, we could not, of course, be absolutely certain. And also there would be much time and effort that would intervene.
>
> And the Board felt that if we reversed the transaction, we would have deterred anybody else from doing likewise.[4]

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[4] It should be noted that as a provision of the Stipulation for Settlement, each and every one of the Lytton Appellees was prohibited from undertaking any "new or further solicitation of proxies thereof for a period of three (3) years from the date of the surrender of the said proxies . . ." (Tr. I, 108).

> However, we did not want -- if he were to make any profit on it himself, or his associates make any profit, this might have given encouragement to someone else. We felt that there was no particular advantage for him making such an investment, entering into such a transaction, having gotten back three or four years later the amount he did put into this. And we realized that in any settlement, there is give and take, and that you never get entirely what you want. On the other hand, the other party does not get entirely what they want.
>
> So, what was worked out, or what was mutually advantageous to the Board, to the Federal Association involved, and to Mr. Lytton -- and we also looked into this from the Board's standpoint of the Board's future operations and responsibilities as you can't separate it, it was all part of the total picture.

Counsel for the Appellants has persisted in pursuing *ad hominem* arguments and applied them to men who have endeavored to lead humble and worthwhile lives and said counsel has again in this same vein commented on page 6 of his brief that "the parties went out and in less than 24 hours rounded up a new Board of Directors chosen by the Bank Board". While it seems unfortunate to find the phrase "rounded up" extant in an Appellate brief, the connotation of "rounded up" and other comments about these directors is completely without foundation.

Looking at the record and their background it can be stated without contradiction, as shall be shown hereinafter, that the Appellee, Association is staffed with new officers and a Board of Directors composed of men well trained and experienced in banking, savings and loan, general business and legal activities. From the example of their past personal lives, it can only be concluded that they will act in the best interest of the members of the Appellee, Association.

Preston Silbaugh, a Director, Chairman of the Board of Directors and Chief Executive Officer of the Association comes to this

position with a superior record of Government service after having served as State Supervisor of Savings & Loan Associations in the State of California and in the international governmental field as a Member of the California-Chile Mission. He was known by former Chairman McMurray as a man who had carried out his duties as State Supervisor courageously and had "acted in a manner which was in the public interest". (McMurray Deposition, p. 119). Chairman McMurray, again speaking in his forthright manner, was most direct when he advised counsel for the Webb defendants why he chose Mr. Silbaugh in the following language:

> . . . And he measured up to his responsibilities in my judgment. Whether you agree in detail with what he did, he certainly was honest, he certainly acted in what he thought was in the best interest of the public and courageously. I might say in many cases I disagreed with his specific action, but that didn't deter me from -- it didn't in any way change my attitude as to his character and integrity and I thought as a head officer of such an association he would act accordingly. And I thought from an image standpoint that the public would understand quickly that if you have a man who was known as a Commissioner, and so on . . . You always have to worry about the confidence of the people and what might happen. And I thought quickly that it would be obvious to everyone at once that he was worthy to entrust confidence in. (*Ibid.*, pp. 119-120.)

Former Chairman McMurray went to to say that this was not a new approach for him because in a supervisory case in the State of New York he had recommended to the board of directors of another Federal Association that the former Superintendent of Banks of the State of New York be named to the board of directors and this "proved to have a very favorable reaction from the general public in that area." (*Idem.*)

Kenneth Spencer, a Director, Vice-President and Chief Managing

Officer of the Association brought to his position, though a man comparatively young in years, a strong background in banking and savings and loan fields. He gained this experience in banking institutions before joining the Federal Home Loan Bank Board as an Examiner in its Boston District. He worked in the Boston District for several years and was highly regarded in this district to the extent that in early 1963 he was transferred to Washington in a more responsible supervisory position. Mr. McMurray describes him as "probably the most surprised person" when he approached him about serving as an officer of the Association, but as the former Chairman said, he was aware not only of Mr. Spencer's background but also because he knew from Mr. Spencer's having worked on the case in detail that he was very familiar with the background of this particular Association. He had also stressed that he had complete confidence "in him as a person, an industrious public-oriented kind of person."

Frank J. Breslin, Jr., a native Californian, whose father is a distinguished Internist in the Los Angeles area, brought to the Board of Directors not only a pertinent background in corporate, banking and business law, but after having been admitted to the bar, and prior to commencing the active practice of the law, he served as an executive in the International Banking field in South America with the National City Bank of New York, one of the major New York based banks having offices in South America.

Edgar Paul Boyko is a member of the Maryland, District of Columbia, California and Alaska Bars. He is a native of Austria who fled his native land after the arrival of the tyrant. Prior to coming to America he helped save lives during the Battle of Britain as the Chief Air Warden at Charing Cross Station in London. Originally, a chemist by profession, he turned to the law while in his twenties, and when a resident of Baltimore matriculated to the University of Maryland Law School. He finished No. 1 in his class and was elected to the Order of

the Coif. In 1945, he was No. 1 on the Maryland Bar Examination. Since his admission to practice in 1945, he has devoted his time both to public service and to the private practice of the law. He has served on the legal staff of the Bureau of Land Management in Washington, as its Chief Counsel in Alaska and as a member of the legal staff of the Office of Price Stablization under Governor DiSalle during the Korean Emergency. In his deposition, former Chairman McMurray paid him a high compliment when he said, "When I was introduced to Mr. Boyko I questioned him somewhat on his background and . . . was extremely impressed by his brilliance and perception and understanding. (*Ibid.*, p. 122.)

The fifth member of the Board elected in January, 1965 was Mr. Harold Webb. Mr. Webb is a Captain, United States Coast Guard, Retired, who devoted a great portion of his life to the service of his country and the protection of its shores after his graduation from the United States Coast Guard Academy. Mr. Webb, who took his law degree at the George Washington University in Washington, D. C., served as the Legislative Representative of the Coast Guard in Washington and also served as Legal Officer for the First Coast Guard District in New York prior to his return to civilian life and his native California. Mr. Webb is a corporate executive in the management and construction field. Mr. McMurray was aware of the high standards of rectitude and administrative ability he had seen manifested by Mr. Webb when he had the opportunity to observe his legislative liaison activities exerted in behalf of the Coast Guard from the late 1940s to the mid-1950s.

In his deposition Mr. McMurray explained that a number of people were considered but were not requested to serve because of the fact that they were involved in activities which would be in conflict with their serving as directors of a Federal Savings and Loan Association. Mr. McMurray indicated that Rabbi Levine eventually came on the Board, which brought to the Board another individual

from a portion of the community about whose integrity there would be no question. (McMurray's deposition, p. 118).

It is suggested that the above background delineation clearly shows the type of men serving the Appellee Association, who will without doub insure that this Association will be managed in accordance with the highest standards of mutuality.

It is manifest from an examination of the record in this case that the settlement which was accomplished was one intended to be and which, we submit, was in fact and in law between and concerning the Lytton Appellees, the Appellee, Association and the Appellee Board. There was no intention to affect in any way the rights of the Appellants. This is clear from the philosophy of the settlement, as previously analyzed, the Stipulation of Settlement, the Judgment of Dismissal and statements of counsel in court contemporaneously with the consummation of the settlement. In fine, the intent of all the parties is manifest. The Appellants were to remain in the lawsuit with no enlargement or diminution of their rights or of the rights of the Appellee, Association or of the Appellee Board.

CONCLUSION

For all of the reasons above set forth, Appellee, Federal Home Loan Bank Board respectfully submits that Judge Whelan properly refused to set aside the dismissal of the Lytton Appellees and properly refused in the alternative to dismiss the Appellants and accordingly, the Appeal should be dismissed.

Respectfully submitted,

RICHARD P. BYRNE,
MacCRACKEN, COLLINS & HAWES,
PHILIP R. COLLINS,
Special Counsel for Appellee,
Federal Home Loan Bank Board.

December 26, 1965.

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full complaince with those Rules.

PHILIP R. COLLINS.

APPENDIX A

Home Owners' Loan Act of 1933, as Amended, 12 U.S.C., Section 1464(d)(1)

§ 1464. Federal Savings and Loan Association.

(a) *Organization authorized.*

In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

* * * * *

(d) *Proceedings to enforce compliance with law and regulations; grounds and procedure for appointment of conservators, etc.; powers.*

(1) The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in paragraph (2) of this subsection, the Board is authorized to act in its own name and through its own attorneys. The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. It shall by formal resolution state any alleged violation of law or regulation and give written notice to the association concerned of the facts alleged to be such violation, except that the appointment of a Supervisory Representation in Charge, a conservator or a receiver shall be exclusively as provided in

paragraph (2) of this subsection. Such association shall have thirty days within which to correct the alleged violation of law or regulation and to perform any legal duty. If the association concerned does not comply with the law or regulation within such period, then the Board shall give such association twenty days' written notice of the charges against it and of a time and place at which the Board will conduct a hearing as to such alleged violation of duty. Such hearing shall be in the Federal judicial district of the association unless it consents to another place and shall be conducted by a hearing examiner as is provided by the Administrative Procedure Act. The Board or any member thereof or its designated representative shall have power to administer oaths and affirmations and shall have power to issue subpenas and subpenas duces tecum, and shall issue such at the request of any interested party, and the Board or any interested party may apply to the United States district court of the district where such hearing is designated for the enforcement of such subpena or subpena duces tecum and such courts shall have power to order and require compliance therewith. A record shall be made of such hearing and any interested party shall be entitled to a copy of such record to be furnished by the Board at its reasonable cost. After such hearing and adjudication by the Board, appeals shall lie as is provided by the Administrative Procedure Act, and the review by the court shall be upon the weight of the evidence. Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. The Board may apply to the United States district court of the district where the association affected has its home office for the enforcement of any order of the Board and such court shall have power to enforce any such order which has become final. The Board shall be subject to suit by any Federal savings and loan association with

respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, or by certified mail, to the Federal Home Loan Bank Board, Washington, District of Columbia.

APPENDIX B

CHARTER K (REVISED) AND BY-LAWS OF FEDERAL ASSOCIATION, TITLE 12, CODE OF FEDERAL REGULATIONS

§ 544.1

* * * * *

(b) *Charter K (rev.).* If expressly requested in the Petition for Charter, or in the Application for Conversion into a Federal association, the Board, in lieu of Charter N, will issue a Charter K (rev.), reading as follows:

CHARTER K (REV.)

1. *Corporate title.* The full corporate title of the Federal association hereby chartered is..... Federal Savings and Loan Association.....

2. *Office.* The home office shall be located at ....., in the County of ....., State of .....

3. *Objects and powers.* The objects of the association are to promote thrift by providing a convenient and safe method for people to save and invest money and to provide for the sound and economical financing of homes; and, in the accomplishment of such objects, it shall have perpetual succession and power: (1) To act as fiscal agent of the United States when designated for that purpose by the Secretary of the Treasury, under such regulations as he may prescribe, and shall perform all such reasonable duties as fiscal agent of the United States as he may require and to act as agent for any other instrumentality of the United States when designated for that purpose by any such instrumentality; (2) To sue and be sued, complain and defend in any court of law or equity; (3) To have a corporate seal, affixed by imprint, facsimile or otherwise; (4) To ap-

point officers and agents as its business shall require, and allow them suitable compensation; (5) To adopt bylaws not inconsistent with the Constitution or laws of the United States and rules and regulations adopted thereunder and this charter; (6) To raise its capital, which shall be unlimited, by accepting payments on savings accounts representing share interests in the association; (7) To borrow money; (8) To lend and otherwise invest its funds; (9) To wind up and dissolve, merge, consolidate, convert, or reorganize; (10) To purchase, hold, and convey real and personal estate consistent with its objects, purposes, and powers; (11) To mortgage or lease any real and personal estate and take such property by gift, devise, or bequest; and (12) To exercise all powers conferred by law. In addition to the foregoing powers expressly enumerated, this association shall have power to do all things reasonably incident to the accomplishment of its express objects and the performance of its express powers. It shall exercise its powers in conformity with all laws of the United States as they now are, or as they may hereafter be amended, and with all rules and regulations which are not in conflict with this charter now or hereafter made thereunder.

4. *Members.* All holders of the association's savings accounts and all borrowers therefrom are members. In the consideration of all questions requiring action by the members of the association, each holder of a savings account shall be permitted to cast one vote for each $100, or fraction thereof, of the withdrawal value of his account. A borrowing member shall be permitted, as a borrower, to cast one vote, and to cast the number of votes to which he may be entitled as the holder of a savings account. No member, however, shall cast more than 50 votes. Voting may be by proxy. Any number of members present at a regular or special meeting of the members shall constitute a quorum. A majority of all votes cast at any meeting of members shall determine any question. The members who shall be entitled to

vote at any meeting of the members shall be those owning savings accounts and borrowing members of record on the books of the association at the end of the calendar month next preceding the date of such meeting. The number of votes which each member shall be entitled to cast at any meeting of the members shall be determined from the books of the association as of the end of the calendar month next preceding the date of such meeting. Those who were members at the end of the calendar month next preceding the date of a meeting of members but who shall have ceased to be members prior to such meeting shall not be entitled to vote thereat. All savings accounts shall be nonassessable.

5. *Directors.* The association shall be under the direction of a board of directors of not less than 5 nor more than 15, as fixed in the association's bylaws or, in the absence of any such bylaw provision, as from time to time expressly determined by resolution of the association's members. Each director of the association shall be a member of the association, and a director shall cease to be a director when he ceases to be a member. Directors of the association shall be elected by its members by ballot: *Provided,* That in the event of a vacancy in the directorate, including vacancies created by an increase in the number of directors, the board of directors may fill such vacancy, if the members of the association fail so to do, by electing a director to serve until the next annual meeting of the members. Directors shall be elected for periods of 3 years and until their successors are elected and qualified, but provision shall be made for the election of approximately one-third of the board of directors each year.

6. *Withdrawals.* The association shall have the right to pay the withdrawal value of its savings accounts at any time upon application therefor and to pay the holders thereof the withdrawal value thereof. Upon receipt of a written request from any holder of a savings account of the association for the withdrawal from such account of all or any part of the withdrawal value

thereof, the association shall within 30 days pay the amount requested: *Provided,* That if the association is unable to pay all withdrawals requested at the end of 30 days from the date of such requests, it shall then proceed in the following manner while any withdrawal request remains unpaid for more than 30 days:

Withdrawal requests shall be paid in the order received and if any holder of a savings account or accounts has requested the withdrawal of more than $1,000, he shall be paid $1,000 in order when reached and his withdrawal request shall be charged with such amount as paid and shall be renumbered and placed at the end of the list of withdrawal requests, and thereafter, upon again being reached, shall be paid a like amount, but not exceeding the withdrawal value of his savings account, and until such withdrawal request shall have been paid in full, shall continue to be so paid, renumbered, and replaced at the end of the withdrawal requests on file: *Provided,* That when any such request is reached for payment, the association shall so advise the holder of such savings account by registered mail to his last address as recorded on the books of the association and, unless such holder shall apply in person or in writing for the payment of such withdrawal request within 30 days from the date of the mailing of such notice, no payment on account of such withdrawal request shall be made and such request shall be cancelled: *And provided further,* That the board of directors shall have absolute right to pay on an equitable basis an amount not exceeding $200 to any holder of a savings account or accounts in any calendar month and without regard to any other provision of this section.

When the association is unable to pay all withdrawal requests within a period not exceeding 30 days from the date of receipt of written request therefor it shall allot to the payment of such requests the remainder of the association's receipts from all sources after deducting from total receipts appropriate amounts for expenses, required payments on indebtedness, earnings distributa-

ble in cash to holders of savings accounts, and a fund for general corporate purposes equivalent to not more than 20 percent of the association's receipts from holders of its savings accounts and from its borrowers. Holders of savings accounts for which application for withdrawal has been made shall remain holders of savings accounts until paid and shall not become creditors.

7. *Redemption.* At any time sufficient funds are on hand, the association shall have the right to redeem, by lot or otherwise as the board of directors may determine, all or any part of any of its savings accounts on June 30 or December 31, by giving 30 days' notice of such redemption by registered mail addressed to the holder of each such savings account at his last address as recorded on the books of the association. The association may not redeem any of its savings accounts when there is an impairment of its capital or when it has any request for withdrawal which has been on file and unpaid for more than 30 days. The redemption price of each savings account redeemed shall be the full value thereof, as determined by the board of directors, but in no event shall the redemption price be less than the withdrawal amount of such savings account. If a savings account which is redeemed is entitled to participate in any reserve for bonus, the amount in such reserve for bonus which is properly allocable to such savings account shall be paid as part of the redemption price thereof. If any notice of redemption shall have been duly given, and if the funds necessary for such redemption shall have been set aside so as to be and to continue to be available for that purpose, earnings upon such account shall cease to accrue from and after the date specified as the redemption date and all rights with respect to each such account shall forthwith, after such redemption date, terminate, except only the right of the holder of record of such savings account to receive the redemption price thereof without earnings.

8. *Loans and investments.* The association may make any loan or investment authorized by statute and

the rules and regulations made by the Home Loan Bank Board and in effect on August 15, 1949; it may make such additional loans and investments as may thereafter be authorized by amendments of the said rules and regulations.

9. *Power to borrow.* The association may borrow money in an aggregate amount not exceeding one-half of its capital; the amount which may be borrowed from sources other than a Federal home loan bank shall not exceed one-tenth of such capital. Notwithstanding the foregoing limitations, the association may, with prior approval by the Federal Home Loan Bank Board, borrow from a Federal home loan bank or from any Federal agency or instrumentality without limitation, upon such terms and conditions as may be required by such bank or agency. The association may pledge and otherwise encumber any of its assets to secure its debts.

10. *Reserves, surplus, and distribution of earnings.* The association shall maintain general reserves for the sole purpose of meeting losses; such reserves shall include the reserve required for insurance of accounts. Any losses may be charged against general reserves. If and whenever the general reserves of the association are not equal to at least 10 percent of its capital, it shall, as of June 30 and December 31 of each year, credit to such reserves an amount equivalent to at least 5 percent of its net earnings for the 6 months' period, or such amount as may be required by the Federal Savings and Loan Insurance Corporation, whichever is greater, until such reserves are equal to at least 10 percent of the association's capital. As of June 30 and December 31 of each year, after payment or provision for payment of all expenses, credits to general reserves and such credits to surplus as the board of directors may determine, and provision for bonus on savings accounts as authorized by regulations made by the Federal Home Loan Bank Board, the board of directors of the association shall cause the remainder of the net earnings of the association for the 6 months' period to be distributed promptly

on its savings accounts, ratably, as declared by the board of directors, to the withdrawal value thereof, in lieu of or in addition to such net earnings, any of the association's surplus funds may be likewise distributed. Such net earnings shall be credited to savings accounts or paid, as directed by the owner. All holders of savings accounts shall participate at the same rate and on the same basis in the distribution of earnings: *Provided,* That the association is not required to distribute earnings on short-term savings accounts or on accounts of $10 or less. Except as provided above, earnings shall be declared on all savings accounts of record at the close of each such 6 months' period, on the withdrawal value of each such account at the beginning of the said 6 months' period, plus the payments made thereon during such period (less amounts withdrawn, and, for purposes of participation in earnings, deducted from the latest previous payments), computed at the declared rate for the time invested, determined as provided below. The date of investment shall be the date of actual receipt of such payments by the association, unless the board of directors fixes a date, not later than the tenth of the month, for determining the date of investment of payments on savings accounts or designated classes thereof. Payments, affected by such determination date, received by the association on or before such determination date, shall receive earnings as if invested on the first of such month. Payments, affected by such determination date, received subsequent to such determination date, shall receive earnings as if invested on the first of the next succeeding month. Notwithstanding any other provision of its charter, the association may distribute net earnings on its savings accounts on such other basis and in accordance with such other terms and conditions as may from time to time be authorized by regulations made by the Federal Home Loan Bank Board. All holders of savings accounts of the association shall be entitled to equal distribution of assets, pro rata to the value of their savings accounts, in the event of

voluntary or involuntary liquidation, dissolution, or winding up of the association.

11. *Amendment of charter.* No amendment, addition, alteration, change, or repeal of this charter shall be made unless such proposal is made by the board of directors of the association, and submitted to and approved by the Federal Home Loan Bank Board, and is thereafter submitted to and approved by the members at a legal meeting. Any amendment, addition, alteration, change, or repeal so acted upon and approved shall be effective, if filed with and approved by the Federal Home Loan Bank Board, as of the date of the final approval of, or as fixed by, the members.

FEDERAL HOME LOAN BANK BOARD.

By .....
(Chairman)

Attest:

.....
(Secretary)

* * * * *

BYLAWS

§ 544.5 *Prescribed form.* A Federal association that has a Charter N or Charter K (rev.) shall operate under the following prescribed bylaws, unless and until such bylaws are amended in accordance with the procedure therein set forth:

1. *Annual meetings of members.* The annual meeting of the members of the association for the election of directors and for the transaction of any other business of the association shall be held at its home office at 2 o'clock in the afternoon on the third Wednesday in January of each year, if not a legal holiday, or if a legal holiday then on the next succeeding day not a legal holiday. The annual meeting may be held at such other time on such day or at such other place in the same community as the board of directors may determine. At each annual meeting, the officers shall make a full report of the financial condition of the association and of its progress for the preceding year, and shall outline a pro-

gram for the succeeding year. Annual meetings of the members shall be conducted in accordance with Roberts' Rules of Order.

2. *Special meetings of members.* Special meetings of the members of the association may be called at any time by the president or the board of directors, and shall be called by the president, a vice president, or the secretary upon the written request of members holding of record in the aggregate at least one-tenth of the capital of the association. Such written request shall state the purposes of the meeting and shall be delivered at the home office of the association addressed to the president. Special meetings of the members shall be conducted in accordance with Roberts' Rules of Order.

3. *Notice of meeting of members.* (a) Notice of each annual meeting shall be either published once a week for the two successive calendar weeks (in each instance on any day of the week) immediately prior to the week in which such annual meeting shall convene, in a newspaper printed in the English language and of general circulation in the city or county in which the home office of the association is located, or mailed postage prepaid at least 15 days and not more than 30 days prior to the date on which such annual meeting shall convene to each of its members of record at his last address appearing on the books of the association. Such notice shall state the name of the association, the place of the annual meeting and the time when it shall convene. A similar notice shall be posted in a conspicuous place in each of the offices of the association during the 14 days immediately preceding the date on which such annual meeting shall convene. If any member, in person or by attorney thereunto authorized, shall waive in writing notice of any annual meeting of members, notice thereof need not be given to such member.

(b) Notice of each special meeting shall be either published once a week for the two consecutive calendar weeks (in each instance on any day of the week) immediately prior to the week in which such special meet-

ing shall convene, in a newspaper printed in the English language and of general circulation in the city or county in which the home office of the association is located, or mailed postage prepaid at least 15 days and not more than 30 days prior to the date on which such special meeting shall convene to each of its members of record at his last address appearing on the books of the association. Such notice shall state the name of the association, the purpose or purposes for which the meeting is called, the place of the special meeting and the time when it shall convene. A similar notice shall be posted in a conspicuous place in each of the offices of the association during the 14 days immediately preceding the date on which such special meeting shall convene. If any member in person or by attorney thereunto authorized, shall waive in writing notice of any special meeting of members, notice thereof need not be given to such member.

4. *Meetings of the board of directors.* The board of directors shall meet regularly without notice at the home office of the association at least once each month at the hour and date fixed by resolution of the board of directors, provided that the place of meeting may be changed by the directors. Special meetings of the board of directors may be held at any place in the territory in which the association may make loans specified in a notice of such meeting and shall be called by the secretary upon the written request of the president, or of three directors. All special meetings shall be held upon at least 3 days' written notice to each director unless notice be waived in writing before or after such meeting. Such notice shall state the place, time, and purposes of such meeting. A majority of the directors shall constitute a quorum for the transaction of business. The act of a majority of the directors present at any meeting at which there is a quorum shall be the act of the board of directors. All meetings of the board of directors shall be conducted in accordance with Roberts' Rules of Order.

5. *Officers, employees, and agents.* Annually at the meeting of the board of directors of the association next following the annual meeting of the members of the association, the board of directors shall elect a president, one or more vice presidents, a secretary, and a treasurer: *Provided*, That the offices of secretary and treasurer may be held by the same person, and a vice president may also be either the secretary or the treasurer. The board of directors may appoint such additional officers and such employees and agents as it may from time to time determine. The term of office of all officers shall be one year or until their respective successors are elected and qualified; but any officer may be removed at any time by the board of directors. In the absence of designation from time to time of powers and duties by the board of directors, the officers shall have such powers and duties as generally pertain to their respective offices.

6. *Resignation of directors.* Any director may resign at any time by sending a written notice of such resignation to the office of the association delivered to the secretary. Unless otherwise specified therein, such resignation shall take effect upon receipt thereof by the secretary. More than three consecutive absences from regular meetings of the board of directors, unless excused by resolution of the board of directors, shall automatically constitute a resignation, effective when such resignation is accepted by the board of directors.

7. *Powers of the board.* The board of directors shall have power—

(a) To appoint and remove by resolution the members of an executive committee, the members of which shall be directors, which committee shall have and exercise the powers of the board of directors between the meetings of the board of directors;

(b) To appoint and remove by resolution the members of such other committees as may be deemed necessary and prescribe the duties thereof;

(c) To fix the compensation of directors, officers, and employees; and to remove any officer or employee at any time with or without cause;

(d) To extend leniency and indulgence to borrowing members who are in distress and generally to compromise and settle any debts and claims;

(e) To limit payments on capital which may be accepted;

(f) To reject any application for savings accounts or membership; and

(g) To exercise any and all of the powers of the association not expressly reserved by the charter to the members.

8. *Execution of instruments, generally.* All documents and instruments or writings of any nature shall be signed, executed, verified, acknowledged, and delivered by such officers, agents, or employees of the association or any one of them and in such manner as from time to time may be determined by resolution of the board of directors. All notes, drafts, acceptances, checks, endorsements, and all evidences of indebtedness of the association whatsoever shall be signed by such officer or officers or such agent or agents of the association and in such manner as the board of directors may from time to time determine. Endorsements for deposit to the credit of the association in any of its duly authorized depositaries shall be made in such manner as the board of directors may from time to time determine. Proxies to vote with respect to shares or accounts of other associations or stock of other corporations owned by or standing in the name of the association may be executed and delivered from time to time on behalf of the association by the president or a vice president and the secretary or an assistant secretary of the association or by any other person or persons thereunto authorized by the board of directors.

9. *Savings account certificates.* Such officers or employees as may be designated by the board of directors shall deliver to each person upon the initial payment on

his savings account in the association an account book or other written evidence of such account.

10. *Seal.* The seal shall be two concentric circles between which shall be the name of the association. The year of incorporation, the word "incorporated", or an emblem may appear in the center.

11. *Amendment.* These bylaws may be amended at any time by a two-thirds affirmative vote of the board of directors, or by a vote of the members of the association. Each and every amendment shall be subject to the approval of the Federal Home Loan Bank Board, and shall be ineffective until such approval shall be given: *Provided,* That, without the approval of the Federal Home Loan Bank Board, section 1 of the bylaws may be amended so that the time of day for convening the annual meeting may be fixed at any hour not earlier than 10 a.m. or later than 9 p.m., and a section providing for a bonus may be added or repealed as provided in the rules and regulations for the Federal Savings and Loan System.

APPENDIX C

Federal Home Loan Bank Board Ruling,
Escrow Business; power to engage in.
[12 CFR 555.2] (Adopted 11-24-59)

A Federal association has no power, express or implied, to act generally as an agent for the public in handling escrows. However, a Federal association may handle escrows related to real estate loans it makes and, to an extent reasonably incidental to the accomplishment of its express objects, may handle escrows for others involving the type of real estate transactions that are common to the savings and loan business. In the handling of any escrow, a Federal association may not assume duties or responsibilities or perform acts which are in conflict with the limitations on its power imposed by the Home Owners' Loan Act of 1933, as amended, and regulations thereunder or its charter.

APPENDIX D

Amendment of September 2, 1964, Section 5(c)
of the Home Owners' Loan Act of 1933,
12 U.S.C.A. § 1464(c)

§ 1464. Federal Savings and Loan Associations

* * *

Loans; security required; investment of assets

(c) * * * Any such association is authorized to invest in the capital stock, obligations, or other securities of any corporation organized under the laws of the State, District, Commonwealth, territory, or possession in which the home office of the association is located, if the entire capital stock of such corporation is available for purchase only by savings and loan associations of that State, District, Commonwealth, territory, or possession and by Federal savings and loan associations having their home offices therein, but no association may make any investment under this sentence if its aggregate outstanding investment under this sentence, determined as prescribed by the Board, would thereupon exceed 1 per centum of its assets.

APPENDIX E

xhibit A to Statement of Points and Authorities in Opposition to Motion to Dismiss of Appellants to Second Amended and Supplemental Complaint of Beverly Hills Federal Savings & Loan Association, filed August 27, 1965-- Affidavit of Lawrence M. Walters, Director of the Office of Examinations and Supervision, Federal Home Loan Bank Board

ISTRICT OF COLUMBIA, SS:

I, LAWRENCE M. WALTERS, being first duly sworn, depose and ay that I am the Director of the Office of Examinations and Supervision f the Federal Home Loan Bank Board, which position I have held since uly 1, 1965. From November 1, 1960 through December 31, 1963, I was ie Director of the Division of Examinations of the Federal Home Loan ank Board and from January 1, 1964 through June 30, 1965, I served as eputy Director of the Office of Examinations and Supervision of the ederal Home Loan Bank Board.

In connection with my duties in these several positions with the Fedral Home Loan Bank Board and even prior to my becoming Director of ie Division of Examinations in 1960, I was and have been acquainted ith KENNETH F. SPENCER and his activities as an employee of this gency.

The records of the Office of Examinations and Supervision, which re kept in the normal course of business, which are under my custody nd control, and which I have examined, reveal that KENNETH F. PENCER was first employed by the Federal Home Loan Bank Board as n Examiner in the Boston District Office on September 21, 1953 and he erved in various grades as an Examiner in the Boston District Office rom September 21, 1953 to the date of his reassignment to the Division f Examinations of the Federal Home Loan Bank Board in Washington on anuary 11, 1963. He served as a Training and Development Officer and s a Savings and Loan Examining Officer from January 11, 1963 until is resignation on January 13, 1965.

The records of this office further reflect that while he was assig duties in connection with the Beverly Hills Federal Savings and Loan Association litigation from early in 1963 to the date of his resignatio he was never present at Beverly Hills Federal Savings and Loan Asso ciation at any time during this period from March 1961 through Janua 1965 nor did he participate as an Examiner in the four regular period or the one special examination of this Association which were conduc at Beverly Hills Federal Savings and Loan Association between April 14, 1961 and January, 1965.

KENNETH F. SPENCER was not present in the City of Los Angel according to the records of this office, during the Special Examinatio of the Association, which commenced on April 17, 1961, nor was he present in Los Angeles during the regular periodic examinations whi were commenced on November 20, 1961, November 26, 1962 and Dec ber 9, 1963, respectively. During the regular periodic examination which commenced on December 17, 1964 and which concluded on Janu ary 29, 1965, he was present in Los Angeles, while he was still an em ployee of this Board, for approximately seven days but I am able to s that he was not present in the Association as an Examiner of the Fede Home Loan Bank Board or in any other capacity as an employee of th agency during this seven-day period.

The records of this office further reveal that during the period f March 14, 1961 to January 29, 1965 the four regular periodic examin tions were held for this Association as required by law and regulatio for all Federal Associations. The one Special Examination previous referenced required Examiners being in the Association for only thi teen (13) workdays.

/s/ Lawrence M. Walters

[Notarial Certificate
dated October 22, 1965]